2003

The State of Utah v. Diane Dunn : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	(	REPLY BRIEF
Plaintiff and Appellee,	)	OF THE APPELLANT
vs.	(	
	)	
DIANE DUNN,	(	Case No. 20030573-CA
	)	
Defendant and Appellant.	(	

Appeal from a conviction of Driving Under the Influence of Alcohol, a Class B misdemeanor in violation of Utah Code Ann. § 41-6-44 (1941 as amended) as entered by the Honorable William W. Barrett, Third Judicial District Court Judge, Salt Lake County, State of Utah.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff and Appellee, vs. DIANE DUNN, Defendant and Appellant.	) ( ) ( ) ( ) (	REPLY BRIEF OF THE APPELLANT Case No. 20030573-CA

REPLY ARGUMENT

POINT I. THE RECKLESS DRIVING STATUTE EXPRESSLY INCLUDES ALL MOVING TRAFFIC VIOLATIONS INCLUDING DRIVING UNDER THE INFLUENCE.

The Appellee answers Ms. Dunn's assertions of error by employing result-oriented reasoning which extends beyond the plain language of the statute to presume the legislature's intent. Appellee urges that "[t]he legislature *obviously* did not intend for DUI and other more serious offenses to be reduced to Reckless Driving." Brief of Appellee at 9 (emphasis added). Regardless of what one presumes the legislature desired or had in mind in writing the statute, due process and long standing rules of statutory construction confine that an analysis be conducted of the language articulated in the statute in question.

In her opening brief Ms. Dunn documented these appropriate rules of statutory construction. The plain language contained within a statute is to be interpreted as the intent of the statute unless an ambiguity exists within the language itself. See Brief of Appellant at 8-12.

> Where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent. Rather, we are guided by the rule that a statute should generally be construed according to its plain language. ... When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction.

Brendle v. City of Draper, 937 P.2d 1044, 1047 (Utah Ct. App. 1997) (quotations and citations omitted).

In a recent case involving the meaning of a statute, the Utah Supreme Court echoed this ruling stating the following:

> In considering the meaning of a [statutory] provision, the analysis begins with the plain language of the provision. . . . We need not look beyond the plain language unless we find some ambiguity in it. Moreover, [t]he plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters.

State v. MacGuire, 2004 UT 4, ¶15 (citations omitted).

Despite the protestations of the State, no ambiguity exists in the plain language of the Reckless Driving Statute. The Reckless Driving statute reads:

> 41-6-45. Reckless driving - Penalty.

(1) *A person is guilty of reckless driving who operates a vehicle*:
(a) in willful or wanton disregard for the safety of persons or property; or
(b) *while committing three or more moving traffic violations under Title 41, Chapter 6, Traffic Rules and Regulations, in a series of acts within a single continuous period of driving.*
(2) A person who violates Subsection (1) is guilty of a class B misdemeanor.

Utah Code Ann. § 41-6-45 (2000)(emphasis added). Ms. Dunn insists that the language in 41-6-45(1)(b) is so plain on its face that any and all moving traffic violations as pronounced by the legislature in Title 41, Chapter 6 are expressly adopted as potential elements of the (1)(b) violation if committed in a series of violations with two others. The State says that the DUI statute is somehow exempted from this plain reading of the statute despite conceding that DUI is a moving traffic violation that falls under Title 41, Chapter 6, of the Traffic Rules and Regulations section of the code. Brief of Appellee at 6.

In short, the State disagrees with the plain meaning encouraged by Ms. Dunn because it does not like the result. For example, the State does not cite to any specific language within the statute which is somehow or in some way ambiguous. Each of the result-oriented interpretations by the State requires this Court to reach beyond the plain language of the legislature and contort a different meaning. None of the interpretations of the State are justified first, because the language is unambiguous thereby forbidding any new construction of the plain language; and second, the State

fails to provide any extended analysis, historic or otherwise, which supports its position other than to impermissibly rewrite the statute and claim disdain for the result. Likewise, State v. Hernandez, 2003 UT App 276, relied on by the State, fails to address the statutory argument at all. By its plain language the DUI statute is an included part of the Reckless Driving statute provided the other two requisite traffic violations are present as exist in this case.

Appellee pleads that the DUI statute and the Reckless Driving statute address wholly distinctive behaviors. Brief of Appellee at 10. Notably, the same can be said for Speeding (§ 41-6-46), Failure to Signal (§ 41-6-71) and any other traffic offense listed within the section. The argument is unhelpful because the plain language of the Reckless Driving statute expressly and unambiguously incorporates every traffic matter within Title 41 and Chapter 6 of the Utah Code regardless of their distinctive behavior. It is a very simple matter for the legislature to exclude or exempt a particular traffic violation, if desired, from being included by spelling out the particular exempt violation. Numerous occurrences of such exemptions or exclusions exist in our code. See, e.g. § 76-5-404.1 and § 76-9-702.5, both statutes are examples of the legislature's ability and prior usage of expressly excluding or exempting more serious charges from a less serious charge. Therefore, had the legislature intended any traffic violation to be exempt from the Reckless Driving claim it could and would have said it was excluded.

The State says, "The defendant fails to explain how eliminating prosecutions under Utah's DUI statute would achieve securing the public's safety." Brief of Appellee at 9. Neither Ms. Dunn nor this Court is required to address this contention of the state. The legislature wrote the statute and if the inarguably plain meaning is something other than that which is desired, then the legislature can rewrite the statute as is their prerogative. As discussed in Ms. Dunn' opening brief, our Utah Supreme Court has addressed this very issue in a Shondel analysis in 1985. There the Court stated:

> This Court does not declare statutes unenforceable or unconstitutional because they could have been better drafted; indeed it has long been the law that we attempt to construe statutes to be constitutional. Nor are we concerned with legislative policy decisions embodied in statutes. Nevertheless, we cannot disregard our responsibility to assure the rational and evenhanded application of the criminal laws. Equal protection of the law guarantees like treatment of all those who are similarly situated. Accordingly, the criminal laws must be written so that there are significant differences between offenses and so that the exact same conduct is not subject to different penalties depending under which of two statutory sections a prosecutor chooses to charge. That would be a form of arbitrariness that is foreign to our system of law. The Legislature may make automobile homicide committed recklessly either a misdemeanor or a felony, but it cannot make the crime both a felony and a misdemeanor, leaving the choice to the prosecutor as to whether he charges a felony or a misdemeanor.

State v. Bryan, 709 P.2d 257, 263 (citations omitted).

This Court should resist the result-oriented interpretations provided by the State to affirm the trial court's erroneous decision, undoubtedly equally

motivated by the same desire to read a contrary result into an otherwise clearly articulated statute. This Court should reverse and remand the Dunn matter to the lower court to enter a sentence on the Reckless Driving violation as clearly indicated in the statute.

POINT II. THE SHONDEL LINE OF CASES REQUIRE THAT MS. DUNN'S CONVICTION BE ENTERED FOR THE CRIME OF RECKLESS DRIVING.

The State of Utah claims that State v. Shondel, 435 P.2d 146 (Utah 1969), and its progeny do not apply because the traffic offenses of Reckless Driving and DUI have different elements. A review of both statutes prior to the 2000 amendment would likely support the claim of the state. However, this claim inarguably fails when applied to the current language of § 41-6-45(1)(b). Again, the statute now reads as follows:

> 41-6-45. Reckless driving - Penalty.
>
> (1) *A person is guilty of reckless driving who operates a vehicle*:
> (a) in willful or wanton disregard for the safety of persons or property; or
> (b) *while committing three or more moving traffic violations under Title 41, Chapter 6, Traffic Rules and Regulations, in a series of acts within a single continuous period of driving.*
> (2) A person who violates Subsection (1) is guilty of a class B misdemeanor.

Utah Code Ann. § 41-6-45 (2000)(emphasis added). In section (1)(b) the legislature has expressly made each and every moving violation in Title 41,

Chapter 6, as a crime and element of reckless driving.[1] Once any three of those offenses are established then the three offenses merge together to create a reckless driving charge. As indicated above, DUI is not exempted from this statute. The State's argument refuses to recognize that the DUI statute, in its entirety, is an included offense just as are all other traffic offenses from Title 41, Chapter 6. Their position to the contrary is without merit and ignores the plain language of the statute and how each traffic offense with all its corresponding elements merge into the Reckless Driving under (1)(b).

The State also claims that Shondel does not apply because the legislature did not intend that all traffic violations be merged into the Reckless Driving statute. Brief of Appellee at 12. This argument is wholly circular and in error. For reasons stated above, where no ambiguity exists and no exclusions or exemptions are expressed, then due process and the Shondel line of authority dictates that the discretion of the prosecutor to choose which statute applies is removed and the penalty of the lesser is appropriately assigned.

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[1] The State of Utah concedes that DUI is a moving traffic violation within 41-6. Brief of Appellee at 6.

Because DUI is an element of the new reckless driving offense of subsection (1)(b) Shondel most certainly applies and the lower punishment of a B misdemeanor necessarily applies.

POINT III. REQUEST FOR ORAL ARGUMENT

The State complains that oral argument would not significantly aid the Court in deciding the case. Ms. Dunn disagrees. Rule 29 of the Utah Rules of Appellate Procedure delineates that "oral argument will be allowed in all cases unless the court concludes: the appeal is frivolous, the issue has recently been authoritatively decided, or that the decisional process would not be significantly aided by the oral argument." Oral argument can help to clarify the positions of the parties that are only briefly provided to the Court in these pleadings.

Ms. Dunn respectfully requests the opportunity to address the Court and believes oral argument unquestionably will aide the decisional process.

CONCLUSION

Appellant DIANE DUNN respectfully requests that this Court to review the statutory construction issues and separate Shondel argument presented herein, and for all or any of the reasons stated, to correct the

decision of the trial court and reverse the conviction for Driving Under the Influence and remand the matter for a new sentencing for the corrected offense of Reckless Driving.

RESPECTFULLY SUBMITTED this 4th day of February, 2004.

BENJAMIN A. HAMILTON
Attorney for Appellant

CERTIFICATION

I, BENJAMIN A. HAMILTON, hereby certify that I have caused eight copies of the foregoing Brief of the Appellant to be delivered to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and two copies of the foregoing Brief of the Appellant were delivered to the Office of the District Attorney for Salt Lake County, 2001 South State Street, S-3700, Salt Lake City, Utah 84190 on this 4th day of February, 2004.

BENJAMIN A. HAMILTON
Attorney for Appellant

DELIVERY

I, Ben Hancock, have delivered the copies of this Brief of Appellant as indicated in the preceding certification this 4th day of February, 2004.